

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20580

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| In the Matter of                          | ) |                      |
|   | ) |                      |
| Rules and Regulations Implementing the    | ) | CG Docket No. 02-278 |
| Telephone Consumer Protection Act of 1991 | ) |                      |

**YELLOW PAGES INTEGRATED MEDIA ASSOCIATION**  
**COMMENTS IN SUPPORT OF PETITIONS FOR RECONSIDERATION**

The Yellow Pages Integrated Media Association (“Yellow Pages I.M.A.”)<sup>1</sup> files these comments in support of the scores of Petitions for Reconsideration filed in the above captioned proceeding regarding the Commission’s changes to the rules for unsolicited facsimile advertisements.

Yellow Pages I.M.A. applauds the Commission’s efforts to limit junk faxes. However, the rules adopted by the Commission clearly go too far. Most consumers do not wish to receive faxes telling them how they can buy inexpensive toner, lose 20 pounds in 10 days, or go to Disney World for only a few dollars a day. On the other hand, legitimate business communications should be able to take place without significant interruption, complication, or fear of litigation.

Lest the Commission believe that these new rules would not result in a landslide of litigation, one of Yellow Pages I.M.A.’s member companies has *already* been threatened with suit for sending under the new rules. A directory publisher’s advertising sales staff called a potential advertiser whose basic listing appears in the Yellow Pages directory. The

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<sup>1</sup> The Yellow Pages I.M.A., formerly the Yellow Pages Publishers Association, is a global trade association based in Berkeley Heights, New Jersey, representing the Yellow Pages industry, both print and electronic. Yellow Pages I.M.A. members include publishers (of both Yellow and White Pages) and other businesses associated with the Yellow Pages industry.

sales person and the advertiser spoke about other services offered by the directory. Directories generally offer enhancements to listings, such as listings under multiple headings, highlighting the listing, taking out an advertisement in the directory, or listing in an on-line directory. The sales person asked the advertiser for permission to fax over a proposal. The advertiser said yes and gave the sales person the fax number. Several days later, the directory publisher received a letter from the advertiser's lawyer demanding \$500 for violating the Commission's rules against unsolicited facsimile advertisements. A redacted version of this letter is attached hereto as attachment A.<sup>2</sup> Of course, the Commission's new rules have not gone into effect and there was clearly oral permission granted, so the lawsuit and threat are without merit. However, if the Commission's rules go into effect, this same exact scene will be repeated over and over again. The Commission and state courts will be clogged with people waving faxes claiming violations of the Commission's rules because there is no written permission on file.

The law of unintended consequences is at work here. The Commission has made it nearly impossible to conduct legitimate business by facsimile transmission. This should be evident by the sheer number of Petitions for Reconsideration filed. The petitions for reconsideration of the unsolicited facsimile advertisement rules raise four broad categories of issues, each with several sub-issues: 1) the elimination of the provision for established business relationships; 2) the requirement for written permission to send an unsolicited facsimile advertisement; 3) the definition of *unsolicited facsimile advertisement*; and 4) the rules regarding communications from a trade association to its members.<sup>3</sup> We agree with the petitions raising these concerns.

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<sup>2</sup> Other Yellow Pages I.M.A. members have encountered a similar problem.

<sup>3</sup> Yellow Pages I.M.A. raised all of these issues in its Petition for Reconsideration.

The Commission should make several changes to its rules to avoid a near certain avalanche of litigation. First, reinstate the established business relationship exemption. In the directory business, faxes are used to routinely confirm the accuracy of a listing or an advertisement. This cannot be done easily over the phone, and U.S. mail and e-mail may not be brought to the attention of the customer in a timely manner. In the process of confirming the accuracy of the listing, the directory publisher will also let the customer know of other options available to them. This is usually done within the same fax transmission. Under the Commission's new rules, however, this would be a violation subjecting the directory publisher to fines and penalties. The alternative for the directory publisher is to send two faxes to the customer, one confirming the listing, and a second, with express permission granted from the customer, with the other products directly related to that listing. Such a result runs contrary to the intent of the statute and the Commission's rules. The intent is to eliminate *unwanted* faxes, not to make it more difficult to conduct legitimate business by fax. Reinstating the established business relationship exemption will allow businesses that conduct their affairs using facsimile transmission to continue to do so, while giving consumers and businesses relief from unknown, unwanted and unsolicited faxes.

The requirement for written permission to send a fax clearly took the business community by surprise. There was not even a hint of this in the Commission's notice. We agree with the Petitions filed by the U.S. Small Business Administration Office of Advocacy, the U.S. Chamber of Commerce and several others that the Commission's action does not meet the requirements of the Regulatory Flexibility Act. The Commission also clearly understated the problems with obtaining written permission to send a fax. It is

an inconvenience to both parties to obtain written permission to receive a fax. If a directory salesperson calls a potential new advertiser, the potential new advertiser may want the salesperson to send a rate sheet and ad mock-up. Usually, this is done very soon after the initial call so that it is fresh in the potential new advertiser's mind. Under the Commission's new rules, the salesperson must tell the potential new advertiser that she cannot send the information until she gets a written, signed permission to fax that information. The potential new advertiser will be dumbfounded that the salesperson cannot send follow-up information without this time consuming and wholly unnecessary step. It will delay the transaction,<sup>4</sup> if not make the potential new advertiser so annoyed as to drop the whole transaction. With more than 3.6 million small businesses depending on directory listings and advertising, this additional burden will harm small business owners throughout the country.

Many parties have requested clarification on what constitutes an *advertisement* for purposes of the unsolicited facsimile advertisement rules. The directory business also has similar issues. Is faxing an annual renewal form to continue a customer's Yellow Pages advertisement in the next directory considered an unsolicited facsimile advertisement? Is faxing out a new study to existing or potential advertisers showing the effectiveness of directory advertising in their business field considered an unsolicited facsimile advertisement? Is faxing out a request for proposals an unsolicited facsimile advertisement? Is faxing out an ad mock-up for a potential new advertiser an unsolicited facsimile advertisement? The Commission and courts will have to deal with these questions daily. The Commission did not change the definition of unsolicited

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<sup>4</sup> Such a delay could cause the advertiser to miss the publication advertising deadline, resulting in the business being left out of the directory for a full year.

advertisement in its Report and Order. That definition has been in effect for years. What did change, however, is the number of facsimile transmissions now subject to that definition. What was once considered mutually beneficial communication between parties is now considered an unsolicited facsimile advertisement. The Commission should clarify that information pertaining to a product or service previously purchased or obtained by a customer in the past three years is not an unsolicited facsimile advertisement. Such a qualification will remove a significant amount of “beneficial” communications from the definition of unsolicited facsimile advertisement, while leaving in place the restriction on unsolicited facsimile advertisements for fad diets, cheap office supplies, and nearly free vacations.

Finally, several trade associations raised the issue of communications among their membership. It is clear that these associations agree with Yellow Pages I.M.A. that membership in a trade association should constitute consent for the purposes of 47 C.F.R. 64.1200(a)(3). Several Petitions detail the difficulty the new rule creates for trade associations. Yellow Pages I.M.A. will encounter similar problems. Yellow Pages I.M.A. has an annual convention and trade show. The association uses U.S. mail, e-mail and facsimile to notify Members about the time and place, the cost, the ability to purchase trade show floor space, the ability to purchase event sponsorships, and other convention-related information. This information is clearly of value to the trade association’s members, yet it would run afoul of the Commission’s new rules.

Yellow Pages I.M.A urges the Commission to grant the many Petitions for Reconsideration of its unsolicited facsimile advertisement rules and reinstate the established business relationship exemption, allow oral permission for those faxes not

permitted by the established business relationship, narrow the definition of unsolicited advertisement, and ensure that communications from a trade association to its members are exempt from these rules.

Respectfully submitted,

**Yellow Pages Integrated Media Association**

By /s/ Joel Bernstein

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October 14, 2003

# **ATTACHMENT A**

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September 23, 2003

Qwest Dex  
Kendra Stroud  
8900 North 22nd Avenue  
Suite #250  
Phoenix AZ 85021

Our Account #: 18607.00 Client: [REDACTED]  
RE: Violation of 47 U.S.C. §227 Concerning Unlawful Facsimile Transmission

Dear Ms. Stroud:

This office represents [REDACTED] concerning the unlawful facsimile transmission received by my client. Pursuant to 47 U.S.C. §227(b)(1)(C), it is unlawful to use a telephone facsimile machine, computer or other device to send unsolicited advertisements to a telephone facsimile machine. In violation of this federal law, you have transmitted an unsolicited facsimile advertisement. Federal law authorizes a minimum award of \$500.00 in damages for each violation, pursuant to 47 U.S.C. §227(b)(3)(B).

Demand is hereby made upon you for the sum of \$500.00 pursuant to law. In the event a lawsuit is filed concerning this matter, my client will seek an award of \$1,500.00, which is authorized in the event the Court finds that you willfully or knowingly violated this federal law. You are directed not to continue to send unsolicited facsimile advertisements to [REDACTED] (fax number [REDACTED]) and if you continue to do so, my client will seek an award of three times the statutory amount (\$1,500.00) in accordance with the above-mentioned federal statute.

You are hereby notified that you have ten (10) days in which to remit \$500.00, made payable to this office, or legal action may be filed against you. In the event a lawsuit is filed, my client will seek all costs associated with this matter.

Should you have any questions, or to make your payment arrangements, please contact my Legal Assistant, Mr. Jamison Messerly, at (602)248-4998.

Sincerely,

  
Gregory A. Larson

enclosure(s)

THIS OFFICE REPRESENTS THE ABOVE-NAMED CLIENT.  
YOU ARE ADVISED NOT TO CONTACT THE CLIENT DIRECTLY.  
ALL COMMUNICATIONS SHOULD BE DIRECTED TO THIS OFFICE.



## Certificate of Service

I, Joel Bernstein, an attorney with the Halprin Temple, certify that I have, on this October 14, 2003, caused to be mailed, first-class, postage prepaid, a copy of the foregoing comments to the following:

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